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State of Utah v. Anthony James Valdez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. ANTHONY JAMES VALDEZ, Defendant/Appellant.	Case No. 20030163-CA

BRIEF OF APPELLEE

APPEAL FROM CONVICTIONS FOR RECEIVING OR TRANSFERRING A STOLEN MOTOR VEHICLE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-1A-1316(2) (1998), AND FAILURE TO RESPOND TO AN OFFICER'S SIGNAL TO STOP, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-13.5 (Supp. 1999), IN THE THIRD JUDICIAL DISTRICT COURT, THE HONORABLE SHEILA K. McCLEVE PRESIDING

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BRIEF OF APPELLEE

* * *

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals his convictions for receiving or transferring a stolen motor vehicle, a second degree felony, in violation of Utah Code Ann. § 41-1a-1316(2) (1998), and failure to respond to an officer's signal to stop, a third degree felony, in violation of Utah Code Ann. § 41-6-13.5 (Supp. 1999), in the Third Judicial District Court, the Honorable Sheila K. McCleve presiding. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e) (2002).

ISSUE PRESENTED ON APPEAL AND STANDARD OF REVIEW

Issue. Was defense counsel ineffective at trial for (1) using the term "fleeing felons" in his closing argument to describe the arresting officer's perception of defendant and the only defense witness and (2) failing to object to a flight instruction that he used as part of his closing arguments?

Standard of Review. Ineffective assistance of counsel claims raised for the first time on appeal are reviewed as questions of law. *State v. Silva*, 2000 UT App. 292, ¶ 12, 13 P.3d 604.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following sections of the Utah code are relevant to this appeal:

41-1a-1316. Receiving or transferring stolen motor vehicle, trailer, or semitrailer - Penalty.

It is a second degree felony for a person:
(1) with intent to procure or pass title to a motor vehicle, trailer, or semitrailer that he knows or has reason to believe has been stolen or unlawfully taken to receive or transfer possession of the motor vehicle, trailer, or semitrailer from or to another; or
(2) to have in his possession any motor vehicle, trailer, or semitrailer that he knows or has reason to believe has been stolen or unlawfully taken if he is not a peace officer engaged at the time in the performance of his duty.

41-6-13.5. Failure to respond to officer's signal to stop - Fleeing - Causing property damage or bodily injury - Suspension of driver's license - Forfeiture of vehicle - Penalties.

(1) (a) An operator who receives a visual or audible signal from a peace officer to bring the vehicle to a stop may not:
(i) operate the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person; or
(ii) attempt to flee or elude a peace officer by vehicle or other means.
(b) A person who violates Subsection (1)(a) is guilty of a felony of the third degree. The court shall, as part of any sentence under this Subsection (1), impose a fine of not less than $1,000.
(2) (a) An operator who violates Subsection (1) and while so doing causes death or serious bodily injury to another person, under circumstances not amounting to murder or aggravated murder, is guilty of a felony of the second degree.
(b) The court shall, as part of any sentence under this Subsection (2), impose a fine of not less than $5,000.
(3) (a) In addition to the penalty provided under this section or any other section, a person who violates Subsection (1)(a) or (2)(a) shall have the

person's driver license revoked under Subsection 53-3-220(1)(a)(ix) for a period of one year.
(b) The court shall forward the report of the conviction to the division. If the person is the holder of a driver license from another jurisdiction, the court shall notify the division and the division shall notify the appropriate officials in the licensing state.

STATEMENT OF THE CASE

Defendant was charged with one count of receiving or transferring a stolen motor vehicle and one count of failure to respond to an officer's signal to stop (R. 2-7). After a two day trial, a jury found defendant guilty on both counts (R. 94-95; 180:152-53). The court sentenced defendant to consecutive prison terms of zero-to-five years for failure to respond to an officer's signal to stop and one-to-fifteen years for receiving or transferring a stolen motor vehicle (R. 161-63). Defendant filed this timely appeal, alleging that his trial counsel was ineffective for not objecting to a jury instruction on flight and for referring to defendant and defendant's only witness as "fleeing felons" (R. 166).

STATEMENT OF FACTS

Defendant, driving a stolen Honda Civic, led police officer Scott Arnold on a high-speed chase through residential sections of West Valley, Utah, near the Valley Fair Mall (R. 180:56-58). The chase terminated when another car turned left in front of defendant causing an accident that immobilized the Honda (R. 180:58-59). Defendant continued his flight on foot through an apartment complex and strip mall before finally surrendering to officers in the backyard of a local resident (R. 180:59-66)

The High-Speed Chase

At approximately 5:30 p.m. on August 25, 2001, Officer Arnold sat in a West Valley parking lot finishing up paperwork (R. 180:49). He was in uniform and in a marked police cruiser (R. 180:49). Officer Arnold noticed a black Honda Civic and a silver car traveling on the road adjacent to the parking lot (R. 180:51). The cars caught his attention because the silver car was following the Honda very closely (R. 180:51). Officer Arnold had learned in peace officer training that stolen vehicles are often "shadowed," or followed closely by another vehicle, to hide the license plate of the stolen vehicle (R. 180:53).

Officer Arnold pulled out behind the two cars and caught a glimpse of the Honda's license plate through a momentary gap between the vehicles (R. 180:53). He entered the license plate number into his on-board computer, and the number came back belonging to a black Honda Civic reported stolen from South Salt Lake a few days earlier (R. 180:53-54). Officer Arnold requested assistance and continued to follow the vehicles (R. 180:54-55).

After a few blocks, the trio reached a stop sign (R. 180:55). The Honda stopped and then proceeded through the stop sign (R. 180:55). The silver car, however, remained stopped, blocking Officer Arnold's path, even though no other traffic approached (R. 180:55). Officer Arnold eventually pulled around the silver car and continued following the Honda (R. 180:56). The Honda turned south and rapidly accelerated away from him (R. 180:57). Officer Arnold activated his siren and flashing red and blue lights and chased after the Honda (R. 180:57). Although the posted speed limit was only twenty-five miles per hour, the Honda raced at speeds as high as sixty miles per hour (R. 180:57, 68). After

several blocks of pursuit, the Honda collided with another car that tried to turn left in front of it (R. 180:58).

The Foot Race

Immediately after the accident, the Honda's doors opened and defendant, wearing a white shirt and ball cap, jumped out of the driver's side (R. 180:59-60, 85-86, 92). Rodrigo Caballero, a passenger dressed in a black T-shirt, exited on the passenger's side (R. 180:59-60, 91). Both men stood dazed for a moment while surveying the fruits of their flight (R. 180:84). They began running when they noticed Officer Arnold exiting his parked cruiser a mere ten feet away (R. 180:64, 84).

Officer Arnold ordered the pair to stop and lay down on the ground (R. 180:68). They ignored his command and ran into an apartment complex (R. 180:66-67). Officer Arnold followed them on foot into the complex, where defendant and Rodrigo split up (R. 180:67). Officer Arnold stayed behind defendant because defendant was the driver (R. 180:66-67). Defendant scrambled over a seven-foot wall into the alley of a strip mall (R. 180:66). Officer Arnold followed him into the parking lot of the strip mall, where defendant rejoined Rodrigo (R. 180:67). The two crossed the street and hopped a fence into the backyard of a residence (R. 180:67). Officer Wycoff joined the pursuit as Officer Arnold crossed the street (R. 180:26.-27, 67). When the officers scaled the fence into the backyard, defendant, short of breath and vomiting, surrendered (R. 180:27, 66, 71). Officer Wycoff apprehended Rodrigo (R. 180:28, 71).

Calling Defendant's Girlfriend

During a search of defendant's person incident to arrest, Officer Arnold discovered a cell phone belonging to defendant's girlfriend, Chrystal Jiminez (R. 180:72). While sitting in the police station parking lot with defendant, Officer Arnold called Ms. Jiminez on the cell phone to ask her what she wanted done with the phone (R. 180: 72). When Officer Arnold and Ms. Jiminez finished speaking, defendant asked to speak to Ms. Jiminez (R. 180:73). Officer Arnold acquiesced and passed the phone through the sliding partition of the cruiser (R. 180:73).

Defendant showed Officer Arnold how to activate the speaker phone feature of the cell phone so that defendant could use the phone without removing his restraints (R. 180:73). As a result, Officer Arnold heard the entire conversation between defendant and his girlfriend (R. 180:74, 77). The two discussed the incident for which defendant had been arrested (R. 180:77). Defendant then said, "I'm sorry baby. I was just being stupid. I'm sorry. I shouldn't have done it" (R. 180:74, 77).

The Trial

At trial, Officer Arnold was the only witness for the state who had observed defendant and Rodrigo exiting the wrecked Honda and who could identify defendant as the driver (R. 180:60, 69). On cross-examination, defense counsel attacked Officer Arnold's perception and memory of the events immediately following the accident (R. 180:78-81). Officer Arnold admitted that this was his first vehicular pursuit and that his adrenaline was pumping during the chase (180:78). He acknowledged that he was excited and that after the accident

things happened very quickly (R. 180:79). He also admitted that he could not remember (1) whether he locked his car before chasing defendant, (2) whether he used his vehicle radio or personal radio to advise dispatch of the accident, and (3) whether the occupants of the vehicle that struck the Honda had injuries requiring immediate medical attention (R. 180:79-81).

Defendant called only one witness, Rodrigo Cabellero (R. 180:87-89). Rodrigo claimed that he was the driver of the Honda and that defendant did not know it was stolen (R. 180:88-89). Rodrigo also claimed that he may have worn a white T-shirt the day he was arrested (R. 180:90).

At the end of the first day of trial, the court reviewed the jury instructions with the parties. The instructions included the following instruction on flight as evidence of defendant's consciousness of guilt:

> The flight or attempted flight of a person immediately after the commission of a crime or after that person is accused of a crime that has been committed, is not sufficient in itself to establish the defendant's guilt. However, such flight, if proved, may be considered by you in light of all other proven facts in the case in determining guilt or innocence.
>
> Although consciousness of guilt may be inferred from flight, it does not necessarily reflect actual guilt of the crime charged, and there may be reasons for flight fully consistent with innocence. Therefore, whether or not evidence of flight shows a consciousness of guilt and the significance, if any, to be attached to any such evidence are matters exclusively within the province of the jury

(R. 122; 180:110-12, 117). Defense counsel did not object to any of the instructions, including the flight instruction (R. 180:107-09).

During closing arguments, defense counsel pointed out that "[t]he only evidence that the State has to say that [defendant] was the driver is the testimony of Officer Arnold" (R. 180:139). He then reviewed a few of the reasons why Officer Arnold's perception of the events immediately following the accident might not be credible, including Officer Arnold's admissions that (1) the pursuit was his first car chase, (2) his adrenaline was pumping, and (3) he was very excited (R. 180:140). Defense counsel also gave examples of facts contemporaneous to the accident that Officer Arnold could not remember such as whether he locked his cruiser and whether he'd contacted dispatch about the accident from his cruiser or over his personal radio during the foot chase (R. 180:140-41). Defense counsel then said, "[N]ot that that's a terribly important issue except for that[sic] it illustrates the fact that he was under a lot of stress at the time. He was chasing fleeing felons and everything happened very quickly" (R. 180:141).

Later in his closing argument, defense counsel stated that defendant's flight was not the product of a guilty conscience (R. 180:143). He read a portion of the flight instruction to the jury and then presented an alternate reason why defendant fled from the accident (R. 180:143).

SUMMARY OF ARGUMENT

A defendant claiming ineffective assistance of counsel must overcome the presumption that counsel's allegedly deficient actions or omissions were part of a legitimate trial strategy. In the present case, defense counsel used the term "fleeing felons" not to concede guilt, but rather, to describe the deleterious effects of the excitement and anxiety of

a high speed pursuit of potentially armed and dangerous car thieves upon the arresting officer's ability to identify the defendant.

The flight instruction was also part of defendant's trial strategy. Defense counsel did not object to the flight instruction because it was proper and because he intended to use it—and did, in fact, use it—in his closing argument.

ARGUMENT

THIS COURT SHOULD UPHOLD DEFENDANT'S CONVICTIONS BECAUSE HIS TRIAL COUNSEL WAS NOT INEFFECTIVE, BUT RATHER FOLLOWED A CONSCIOUS TRIAL STRATEGY

Defendant first claims that his trial counsel was ineffective for referring to defendant and the only defense witness as "fleeing felons." Aplt. Br. at 13. Defendant asserts that by uttering the phrase "fleeing felons" during closing arguments defense counsel abandoned defendant's trial strategy of contesting both charges and admitted defendant's guilt. Aplt. Br. at 14-15. Defendant also claims that defense counsel was ineffective for not objecting to a jury instruction on flight. Aplt. Br. at 16-18. Defendant's claims are meritless.

A. Defendant must show deficient representation and prejudice.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To establish that he did not receive the representation guaranteed by the Sixth Amendment, defendant must prove two elements. First, defendant must identify the specific acts or omissions he claims fell below an objective standard of reasonableness. *See*

Strickland, 466 U.S. at 687-88, 690; *Parsons v. Barnes*, 871 P.2d 516, 521 (Utah 1994). In proving that counsel's representation fell below an objective standard of reasonableness, defendant must rebut "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland* 466 U.S. at 689 (quoting *Michel v. Lousiana*, 350 U.S. 91, 101 (1955). The Court must give counsel wide latitude to make tactical decisions and "will not question such decisions unless [it] find[s] 'no reasonable basis' for them." *Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995) (*quoting Fernandez v. Cook*, 870 P.2d 870, 876 (Utah 1993)). "[D]eference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, No. 02-1597, slip op. at 5 (U.S. Oct. 20, 2003) (per curiam), attached as **Addendum**.

The second element of an ineffective assistance of counsel claim requires defendant to prove that "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687; *see also, Parsons*, 871 P.2d at 522. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

B. Defense counsel's use of the phrase "fleeing felons" was part of a legitimate trial strategy to impeach Officer Arnold's perception and memory of the events immediately following the accident.

Defendant's claim on appeal takes the term "fleeing felons" out of context. When considered in light of defense counsel's entire closing argument, it is clear that defense counsel used the term "fleeing felons" not to concede guilt, but to describe Officer Arnold's state of mind during the high-speed chase. Such a description was a necessary component of defendant's trial strategy to attack Officer Arnold's credibility by arguing to the jury the deleterious effects of excitement and adrenaline on Officer Arnold's ability to accurately identify the occupants of the Honda.

Defendant's cross-examination tactics and closing argument demonstrate that his primary strategy at trial was to impeach Officer Arnold's testimony concerning who exited which side of the Honda after the accident. During the presentation of evidence, defense counsel asked only one or two questions of most of the State's witnesses (R. 180:22, 30, 39). However, he asked Officer Arnold nearly fifty questions, many of which concerned the chase and Officer Arnold's emotions (R. 180:76-84). Then, in closing argument, defense counsel told the jury that the critical issue at trial was whether defendant was the driver of the stolen Honda (R. 180:137). He stated that Officer Arnold's testimony was the only evidence the state had to prove that defendant was the driver (R. 180:139). He also noted that Officer Arnold never saw the driver during the chase, but only claimed to have seen a person in a white shirt exit the driver's side of the Honda after the accident (R. 180:59-60, 85-86, 92, 139).

Defense counsel then argued that the excitement and anxiety of a high speed pursuit of two car thieves impaired Officer Arnold's perception and memory of the events immediately after the accident (R. 180:140-41). Defense counsel told the jury:

> Officer Arnold had been a police officer for 13 months, nothing wrong with that but this was his very first car chase, very first time he'd been involved in this sort of situation where you must admit your adrenaline is pumping. There's a lot of stress going on. He said that he was very excited. He also testified that everything happened very quickly.

(R. 180:140).

He then cited two examples of facts that Officer Arnold could not remember:

> He didn't remember if he had locked his car when he left. He did testify that he left the car right there in the intersection and took off. He didn't remember whether he'd locked it or not. He did say that he left his keys in it and that he had a second set of keys. He told dispatch of the accident but he couldn't recall whether he had told dispatch about that accident while he was still in his patrol car through his patrol radio or whether he did it after he was out of the car and involved in the foot chase . . . .

(R. 180:140-41). Defense counsel then made the contested statement, ". . . and not that that's a terribly important issue except for that[sic] it illustrates the fact that he was under a lot of stress at the time. He was chasing fleeing felons and everything happened very quickly" (R. 180:141).

The term "fleeing felons" was not, as defendant claims, an admission of guilt, but rather, part of a description of Officer Arnold's state of mind. Counsel wanted the jury to understand that Officer Arnold was a nervous rookie cop in his first high-speed pursuit of automobile thieves and to believe that the excitement of the circumstances clouded his perception. Viewed in the context as part of an ongoing description of Officer Arnold's

perceptions that lead to his excited state, it is clear that defense counsel meant that Officer Arnold was chasing fleeing men he believed were felons, not that defendant and Rodrigo were actually felons. Counsel's statements after the "fleeing felons" remark support this intent:

> [Officer Arnold] was doing his job but he was under a great deal of stress. He had called for backup. The backup hadn't arrived yet. Their typical procedure and smart procedure is, you know, if you're going to stop somebody whose[sic] in a car that is stolen, you want to have some backup there. People who steal cars sometimes are armed, they can be dangerous people. But backup hadn't arrived when this chase began but he turned on the lights and the car began to speed away. So there was a lot of adrenaline going on.

(R. 180:141). The term "fleeing felons" had the same purpose and effect as the phrases "a car that is stolen," "[p]eople who steal cars sometimes are armed," and "they can be dangerous people." Together they cast defendant and Rodrigo as potentially armed and dangerous fleeing car thieves, but they do not constitute an admission that the pair were armed or guilty of automobile theft. Instead, they communicate to the jury why Officer Arnold was nervous and excited and thus might have misperceived who got out of which side of the Honda. The negative terms were therefore necessary because impeachment of Officer Arnold's testimony was the crux of defendant's entire defense. Had defense counsel used innocuous terms to describe Officer Arnold's perception of defendant rather than words of culpability, it would have undercut defense counsel's trial strategy.

No only does defendant's argument fail because he has taken the term "fleeing felons" out of context, defendant also lacks any supporting authority for his assertion that "any defendant whose counsel has named him to the jury a 'fleeing felon'" has been denied a

fundamentally fair proceeding. Aplt Br. at 16. Defendant cites no Utah case law to support his assertion and instead relies on *Wade v. Calderon*, 29 F.3d 1312, 1324 (9th Cir. 1994) and *People v. Woods*, 502 N.E.2d 1103, 1107 (Ill Ct. App. 1986). Aplt. Br. at 14-15. *Wade* and *Woods* do not support defendant's assertion.

In *Wade*, the court found counsel's conduct at a capital sentencing hearing inadequate where (1) counsel presented no evidence of Wade's abuse as a child; (2) counsel summoned "Othello," Wade's profane, insulting, alternate personality who wanted to kill Wade and challenged the jury to execute him, and (3) counsel told the jury that executing Wade would actually be a gift of life and would allow Wade to escape "the horror that he and only he knows so well." *Wade*, 29 F.3d 1323-24. The court held that "[b]y arguing to the jury that executing Wade would benefit Wade by freeing him of his mental illness, counsel's argument resulted in the 'breakdown in the adversarial process that our system counts on to produce just results.'" *Id.* at 1324 (quoting *Strickland*, 466 U.S. at 696). Counsel's performance in *Wade* was part of a strategy to aggravate, rather than ameliorate, the Wade's case. In the present case, however, defense counsel did not advocate that the jury consider defendant and Rodrigo "fleeing felons," he was simply illustrating Officer Arnold's point of view in order to attack his credibility.

Woods is similarly distinguishable. In *Woods*, both defendants testified that they were not present and not involved when a battery was stolen from a car. *Woods*, 502 N.E.2d at 1106. During closing argument, however, defense counsel admitted that the defendants stole the battery and argued that they should be guilty only of theft and not of burglary as charged.

Id. The court held that "[b]y contradicting his clients' testimony, defense counsel destroyed whatever credibility they had and effectively deprived them of a defense to the charges." *Id.* at 1107. Thus in *Woods*, defense counsel's admission cut against the already established trial strategy. In the instant case, however, defense counsel's use of the term "fleeing felons" was a key part of a sound strategy to impeach the State's linchpin witness, not a purposeful admission of guilt as were counsel's statements in *Woods*.

That appellate counsel or the Court may disagree with trial counsel's strategy does not render it unreasonable. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland* 466 U.S. at 689. "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; . . . ." *Id.* Defense counsel's strategy here falls within that "wide range."

Thus, defendant's claim fails.

C. The flight instruction was key to defendant's trial strategy; moreover, the instruction was proper.

Defendant asserts that his counsel was ineffective for failing to object to the flight instruction or asking the court to limit the instruction. Aplt. Br. at 16. Specifically, defendant claims the instruction bore no relation to the evidence supporting his conviction for failure to respond an officer's signal to stop because the flight occurred during, not after, his commission of that crime. Aplt. Br. at 16, 18. Defendant's claim is meritless.

Defense counsel did not object to the flight instruction because the instruction was a key component of his trial strategy, and he used it in closing argument. Defendant did not dispute that he was in the vehicle—he claimed only that he was not the driver and did not

know the vehicle was stolen (R. 180:138). The State argued, however, that defendant's flight indicated that he was guilty. In response, defense counsel referred the jury to the flight instruction:

> Mr. Burmester has said that because Anthony ran away, you should find that that's a knowledge of guilt. When you go into the jury room you'll have a copy of the jury instructions that the judge read to you. The instruction regarding flight is Instruction #9 and I'm not going to reread the whole instruction to you but just part of it says, flight or attempted flight of a person after the commission of a crime is not sufficient in and of itself to establish the defendant's guilt. So what's a reasonable explanation? Why would Anthony run away if he wasn't the driver of this car, he didn't know that the car had been stolen when he got into it with Rodrigo?

(R. 180:143).

Defendant then provided the jury with an alternative explanation:

> Well, it's pretty obvious what the reasonable explanation is. Rodrigo is in this car, Anthony gets in the car and they're driving along and the officer turns his lights on and does Rodrigo pull over? No, he doesn't pull over. The officer turns his siren on. Does Rodrigo pull over? No, he speeds up and he's taking off. Well, right away anybody who is a passenger in that car knows "we're in trouble. Whether I did anything wrong of not, we're in trouble."

(R. 180:143). Far from prejudicing defendant, the flight instruction expressly instructed the jury to consider defense counsel's alternative explanation for why defendant ran from Officer Arnold.

Even if defense counsel had objected to the flight instruction, the trial court would have overruled the objection, because the instruction was proper. The trial court may give a flight instruction when it is supported by the evidence and "'bear[s] a relationship to evidence reflected in the record.'" *State v. Riggs*, 1999 UT App 271, ¶ 9, 987 P.2d 1281 (quoting *State v. Pacheco*, 495 P.2d 808, 808 (Utah 1972). A flight instruction is supported

by the evidence if the evidence of flight presented at trial is not slight or contradictory. *State v. Bales*, 675 P.2d 573, 575 (Utah 1983). A flight instruction bears a relationship to the evidence in the record if the jury could logically infer consciousness of guilt about the charged crimes from defendant's flight. *Riggs*, 1999 UT App 271, ¶ 11. Where the jury can logically apply the flight instruction to only some of the charges, the instruction is nevertheless proper. The trial court need not even issue an instruction limiting the application of the flight instruction to those charges. *Id.* at ¶ 13.

In *Riggs*, Daniel Riggs was driving a stolen pickup truck while intoxicated. *Id.* at ¶ 2-3. When a Utah Highway Patrol Trooper signaled Riggs to stop, Riggs attempted to evade the trooper. *Id.* at ¶ 2. During the ensuing pursuit, Riggs ran a red light and struck a car killing both passengers in the car and the passenger in his truck. *Id.* Riggs was tried on three counts of automobile homicide *Id.* at ¶ 4. However, at Riggs's request, the court also instructed the jury on the lesser included offense of driving while under the influence. *Id.* ¶ 11. The jury convicted defendant of automobile homicide, and on appeal Riggs challenged a flight instruction issued by the trial court. *Id.* at ¶ 5. Riggs claimed that the court erred giving the flight instruction because his flight occurred before the fatal crash. *Id.* at ¶ 9. This Court disagreed, holding:

> Although the trial court did not specifically limit the flight instruction to the lesser included offense of driving while under the influence, the instruction, by its own terms, could not logically be applied by the jury to the automobile homicides. While it may be preferable to narrowly tailor this type of instruction to the appropriate offense, the trial court did not err in giving the instruction.

Id. at 13.

The present case differs from *Riggs* only in that the evidence of the charge to which the flight instruction is inapplicable, failure to respond to an officer's signal to stop, occurred during rather than after the flight. It remains, however, that the jury could not have logically inferred that defendant's vehicular flight was evidence of guilt of failing to respond to an officer's signal to stop. By its own terms, the flight instruction only applied to "flight or attempted flight of a person *immediately after* the commission of a crime" (R. 122) (emphasis added). Thus the jury, by the terms of the instruction, could not consider his flight during the vehicular pursuit as evidence defendant's consciousness of guilt for failing to respond to an officer's signal to stop.

Defendant relies on a memorandum decision, *State v. Dupont*, 2002 UT App 378, WL 31600358, for his assertion that the instruction was improper. *Dupont* does not support defendant's assertion because this Court in *Dupont* declined to rule on the exact issue defendant raises. In *Dupont*, officers discovered controlled substances in Dupont's vehicle during a traffic stop. 2002 UT App 378, page 2. When one officer told the other to arrest Dupont, Dupont ran. *Id.* Officers quickly apprehended him, and Dupont was charged with possession of a controlled substance and interfering with an arresting officer. *Id.* at page 1-2. At trial, the court gave the jury a flight instruction over Dupont's objection. *Id.* at page 3. On appeal, this Court held that the instruction was proper as to the possession charge because the flight occurred after the commission of the crime of possession. *Id.* at page 3. But this Court declined to rule on whether the flight instruction was proper as to the interference

charge. *Id.* It held instead that any error in issuing the flight instruction was harmless because of the weight of the evidence. *Id.*

Defendant has not shown that the court would have sustained an objection to the flight instruction, and the instruction was necessary to defendant's trial strategy. Defense counsel was not, therefore, ineffective for failing to object or to request a limiting instruction. *See State v. Kelley*, 2000 UT 41 ¶ 26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance of counsel.").

Thus, defendant's claim fails.

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's conviction

Respectfully submitted October 22, 2003.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

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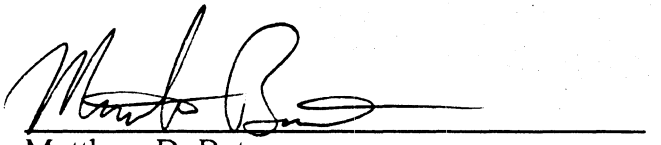
CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2003, I served two copies of the foregoing Brief of Appellee upon the defendant/respondent, Anthony James Valdez, by causing them to be delivered by first class mail to Margaret P. Lindsay and Patrick V. Lindsay, attorneys for defendant, at Aldrich, Nelson, Weight & Esplin, 43 East 200 North, PO BOX "L", Provo, Utah 84603-0200.



Matthew D. Bates
Assistant Attorney General

Addendum

SUPREME COURT OF THE UNITED STATES

MICHAEL YARBOROUGH, WARDEN, ET AL. *v.* LIONEL E. GENTRY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02–1597. Decided October 20, 2003

PER CURIAM.

I

Respondent Lionel Gentry was convicted in California state court of assault with a deadly weapon for stabbing his girlfriend, Tanaysha Handy. Gentry claimed he stabbed her accidentally during a dispute with a drug dealer.

Handy testified for the prosecution. She stated that she recalled being stabbed but could not remember the details of the incident. The prosecution then confronted Handy with her testimony from a preliminary hearing that Gentry had placed his hand around her throat before stabbing her twice.

Albert Williams, a security guard in a neighboring building, testified that he saw Gentry, Handy, and another man from his third-floor window. According to Williams, Gentry swung his hand into Handy's left side with some object, causing her to lean forward and scream. Williams was inconsistent about the quality of light at the time, stating variously that it was "pretty dark" or "getting dark," that "it wasn't that dark," and that the area of the stabbing was "lighted up." See *Gentry* v. *Roe*, 320 F. 3d 891, 896–897 (CA9 2003).

Gentry testified in his own defense that he had stabbed Handy accidentally while pushing her out of the way. When asked about prior convictions, he falsely stated that he had been convicted only once; evidence showed he had

been separately convicted of burglary, grand theft, battery on a peace officer, and being a felon in possession of a firearm. He attributed his error to confusion about whether a plea bargain counted as a conviction.

In her closing argument, the prosecutor expressed sympathy for Handy's plight as a pregnant, drug-addicted mother of three and highlighted her damaging preliminary hearing testimony. She accused Gentry of telling the jury a "pack of lies." See *id.*, at 897–898. Defense counsel responded with the following closing argument:

> "'I don't have a lot to say today. Just once I'd like to find a prosecutor that doesn't know exactly what happened. Just once I'd like to find a D. A. that wasn't there and that can tell and they can stand up here and be honest and say I don't know who is lying and who is not 'cause she wasn't there, ladies and gentlemen. [I] wasn't there. None of the 12 of you were there. None of the other people in this courtroom were there except those two people and that one guy who saw parts of it, or saw it all. Pretty dark. Dark. It was light. Those are the three versions of his testimony with regard to what he saw and what he saw. I don't know what happened. I can't tell you. And if I sit here and try to tell you what happened, I'm lying to you. I don't know. I wasn't there. I don't have to judge. I don't have to decide. You heard the testimony come from the truth chair. You heard people testify. You heard good things that made you feel good. You heard bad things that made you feel bad.
>
> "'I don't care that Tanaysha is pregnant. I don't care that she has three children. I don't know why that had to be brought out in closing. What does that have to do with this case? She was stabbed.
>
> "'The question is, did he intend to stab her? He said he did it by accident. If he's lying and you think he's

lying then you have to convict him. If you don't think he's lying, bad person, lousy drug addict, stinking thief, jail bird, all that to the contrary, he's not guilty. It's as simple as that. I don't care if he's been in prison. And for the sake of this thing you ought not care because that doesn't have anything to do with what happened on April 30th, 1994.

"'He doesn't know whether or not he's been convicted. Didn't understand the term conviction. That is not inconsistent with this whole thing of being spoken and doing all this other crime stuff as opposed to going to school. I don't know. I can't judge the man. The reason that they bring 12 jurors from all different walks of life, let them sit here and listen to people testify, and the reason that the court will give you instructions with regard to not having your life experience, leaving it at the door, is because you can't just assume that because a guy has done a bunch of bad things that he's now done this thing.

"'I don't know if thievery and stabbing your girlfriend are all in the same pot. I don't know if just because of the fact that you stole some things in the past that means you must have stabbed your girlfriend. That sounds like a jump to me, but that's just [me]. I'm not one of the 12 over there.

"'All I ask you to do is to look at the evidence and listen to everything you've heard and then make a decision. Good decision or bad decision, it's still a decision. I would like all 12 of you to agree; but if you don't, I can't do anything about that either.

"'You heard everything just like all of us have heard it. I don't know who's lying. I don't know if anybody is lying. And for someone to stand here and tell you that they think someone is lying and that they know that lying goes on, ladies and gentlemen, if that person was on the witness stand I'd be objecting that

> they don't have foundation because they weren't there. And that's true. The defense attorney and the prosecutor, no different than 12 of you.
>
> "'So I'd ask you to listen to what you've heard when you go back, ask you to take some time to think about it, and be sure that's what you want to do, then come out and do it.
>
> "'Thank you.'" *Id.*, at 898–899 (one paragraph break omitted).

After deliberating for about six hours, the jury convicted.

On direct appeal, Gentry argued that his trial counsel's closing argument deprived him of his right to effective assistance of counsel. The California Court of Appeal rejected that contention, and the California Supreme Court denied review. Gentry's petition for federal habeas relief was denied by the District Court, but the Court of Appeals for the Ninth Circuit reversed. We grant the State's petition for a writ of certiorari and the motion for leave to proceed *in forma pauperis* and reverse.

II

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense. *Wiggins* v. *Smith*, 539 U. S. __, __ (2003) (slip op., at 8); *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984). If a state court has already rejected an ineffective-assistance claim, a federal court may grant habeas relief if the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1). Where, as here, the state court's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unrea-

sonable. *Wiggins*, *supra*, at __ (slip op., at 8); *Woodford* v. *Visciotti*, 537 U. S. 19, 24–25 (2002) *(per curiam)*; *Williams* v. *Taylor*, 529 U. S. 362, 409 (2000).

The right to effective assistance extends to closing arguments. See *Bell* v. *Cone*, 535 U. S. 685, 701–702 (2002); *Herring* v. *New York*, 422 U. S. 853, 865 (1975). Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should "sharpen and clarify the issues for resolution by the trier of fact," *id.*, at 862, but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. See *Bell*, *supra*, at 701–702. Judicial review of a defense attorney's summation is therefore highly deferential—and doubly deferential when it is conducted through the lens of federal habeas.

In light of these principles, the Ninth Circuit erred in finding the California Court of Appeal's decision objectively unreasonable. The California court's opinion cited state case law setting forth the correct federal standard for evaluating ineffective-assistance claims and concluded that counsel's performance was not ineffective. That conclusion was supported by the record. The summation for the defense made several key points: that Williams's testimony about the quality of light was inconsistent; that Handy's personal circumstances were irrelevant to Gentry's guilt; that the case turned on whether the stabbing was accidental, and the jury had to acquit if it believed Gentry's version of events; that Gentry's criminal history was irrelevant to his guilt, particularly given the seriousness of the charge compared to his prior theft offenses; and that Gentry's misstatement of the number of times he had been convicted could be explained by his lack of education.

Woven through these issues was a unifying theme—that the jury, like the prosecutor and defense counsel himself, were not at the scene of the crime and so could only speculate about what had happened and who was lying.

The Ninth Circuit rejected the state court's conclusion in large part because counsel did not highlight various other potentially exculpatory pieces of evidence: that Handy had used drugs on the day of the stabbing and during the early morning hours of the day of her preliminary hearing; that Williams's inability to see the stabbing clearly was relevant to the issue of intent; that Gentry's testimony was consistent with Williams's in some respects; that the government did not call as a witness Williams's co-worker, who also saw the stabbing; that the stab wound was only one inch deep, suggesting it may have been accidental; that Handy testified she had been stabbed twice, but only had one wound; and that Gentry, after being confronted by Williams, did not try to retrieve his weapon but instead moved toward Handy while repeating, "she's my girlfriend." See 320 F. 3d, at 900–901.

These other potential arguments do not establish that the state court's decision was unreasonable. Some of the omitted items, such as Gentry's reaction to Williams, are thoroughly ambiguous. Some of the others might well have backfired. For example, although Handy claimed at trial she had used drugs before the preliminary hearing, she testified at the hearing that she was not under the influence and could remember exactly what had happened the day of the stabbing. And, although Handy's wound was only one inch deep, it still lacerated her stomach and diaphragm, spilling the stomach's contents into her chest cavity and requiring almost two hours of surgery. These are facts that the prosecutor could have exploited to great advantage in her rebuttal.

Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel

was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach. As one expert advises: "The number of issues introduced should definitely be restricted. Research suggests that there is an upper limit to the number of issues or arguments an attorney can present and still have persuasive effect." R. Matlon, Opening Statements/Closing Arguments 60 (1993) (citing Calder, Insko, & Yandei, The Relation of Cognitive and Memorial Process to Persuasion in a Simulated Jury Trial, 4 J. Applied Social Psychology 62 (1974)). Another authority says: "The advocate is not required to summarize or comment upon all the facts, opinions, inferences, and law involved in a case. A decision not to address an issue, an opponent's theory, or a particular fact should be based on an analysis of the importance of that subject and the ability of the advocate and the opponent to explain persuasively the position to the fact finder." R. Haydock & J. Sonsteng, Advocacy: Opening and Closing §3.10, p. 70 (1994). In short, judicious selection of arguments for summation is a core exercise of defense counsel's discretion.

When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. See *Strickland*, 466 U. S., at 690 (counsel is "strongly presumed" to make decisions in the exercise of professional judgment). That presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court "may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive." *Massaro* v. *United States*, 538 U. S. __, __ (2003) (slip op., at 4). Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with

the benefit of hindsight. See *Bell*, 535 U. S., at 702; *Kimmelman* v. *Morrison*, 477 U. S. 365, 382 (1986); *Strickland*, *supra*, at 689; *United States* v. *Cronic*, 466 U. S. 648, 656 (1984). To recall the words of Justice (and former Solicitor General) Jackson: "I made three arguments of every case. First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night." Advocacy Before the Supreme Court, 37 A. B. A. J. 801, 803 (1951). Based on the record in this case, a state court could reasonably conclude that Gentry had failed to rebut the presumption of adequate assistance. Counsel plainly put to the jury the centerpiece of his case: that the only testimony regarding what had happened that the jury heard "come from the truth chair" was conflicting; that none of his client's testimony was demonstrably a lie; and that the testimony contradicting his client came in "three versions." See 320 F. 3d, at 898. The issues counsel omitted were not so clearly more persuasive than those he discussed that their omission can only be attributed to a professional error of constitutional magnitude.

The Ninth Circuit found other flaws in counsel's presentation. It criticized him for mentioning "a host of details that hurt his client's position, none of which mattered as a matter of law." *Id.*, at 900. Of course the reason counsel mentioned those details was precisely to remind the jury that they *were* legally irrelevant. That was not an unreasonable tactic. See F. Bailey & H. Rothblatt, Successful Techniques for Criminal Trials §19:23, p. 461 (2d ed. 1985) ("Face up to [the defendant's] defects . . . [and] call upon the jury to disregard everything not connected to the crime with which he is charged"). The Ninth Circuit singled out for censure counsel's argument that the jury must acquit if Gentry was telling the truth, even though he was a "bad

person, lousy drug addict, stinking thief, jail bird." See 320 F. 3d, at 900. It apparently viewed the remark as a gratuitous swipe at Gentry's character. While confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. This is precisely the sort of calculated risk that lies at the heart of an advocate's discretion. By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case. See J. Stein, Closing Argument §204, p. 10 (1992–1996) ("[I]f you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate"). As Judge Kleinfeld pointed out in dissenting from denial of rehearing en banc, the court's criticism applies just as well to Clarence Darrow's closing argument in the Leopold and Loeb case: "'I do not know how much salvage there is in these two boys. . . . [Y]our Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind.'" 320 F. 3d, at 895 (quoting Famous American Jury Speeches 1086 (Hicks ed. 1925) (reprint 1990)).

The Ninth Circuit rebuked counsel for making only a passive request that the jury reach some verdict, rather than an express demand for acquittal. But given a patronizing and overconfident summation by a prosecutor, a low-key strategy that stresses the jury's autonomy is not unreasonable. One treatise recommends just such a technique: "Avoid challenging the jury to find for your client, or phrasing your argument in terms suggesting what their finding must be. . . . [S]cientific research indicates that jurors will react against a lawyer who they think is bla-

tantly trying to limit their freedom of thought." Stein, *supra*, §206, at 15.

The Ninth Circuit faulted counsel for not arguing explicitly that the government had failed to prove guilt beyond a reasonable doubt. Counsel's entire presentation, however, made just that point. He repeatedly stressed that no one—not the prosecutor, the jury, nor even himself—could be sure who was telling the truth. This is the very essence of a reasonable-doubt argument. To be sure, he did not insist that the existence of a reasonable doubt would *require* the jury to acquit—but he could count on the judge's charge to remind them of that requirement, and by doing so he would preserve his strategy of appearing as the friend of jury autonomy.

Finally, the Ninth Circuit criticized counsel's approach on the ground that, by confessing that he too could not be sure of the truth, counsel "implied that even he did not believe Gentry's testimony." 320 F. 3d, at 900. But there is nothing wrong with a rhetorical device that personalizes the doubts anyone but an eyewitness must necessarily have. Winning over an audience by empathy is a technique that dates back to Aristotle. See P. Lagarias, Effective Closing Argument §§2.05–2.06, pp. 99–101 (1989) (citing Aristotle's Rhetoric for the point that "[a] speech should indicate to the audience that the speaker shares the attitudes of the listener, so that, in turn, the listener will respond positively to the views of the speaker"); *id.*, §3.03, at 112 (deriving from this principle the advice that "counsel may couch his arguments in terms of 'we,' rather than 'you, the jury'").

To be sure, Gentry's lawyer was no Aristotle or even Clarence Darrow. But the Ninth Circuit's conclusion—not only that his performance was deficient, but that any disagreement with that conclusion would be objectively unreasonable—gives too little deference to the state courts that have primary responsibility for supervising defense

counsel in state criminal trials.

* * *

The judgment of the Ninth Circuit is reversed.

It is so ordered.